first defendant said that when he reached the junction he stopped, as the traffic light was red, and when the traffic light turned green, he drove his motor taxi forward and stopped to give way to oncoming vehicles. When the green arrow light came on, he saw two motorcycles coming from the opposite direction and he started to turn right; he did not give way to them. He said that they should stop. At that moment he could, and should, have stopped and refrained from turning right, thus avoiding the accident, and, in my view, in this respect the first defendant was at least, and probably to a lesser extent than the second defendant, partly to blame for the accident. In this connection, it should be borne in mind that even if the extent of his blame for the accident was only 1%, the first defendant would still be a joint tortfeasor with the second defendant and vis-à-vis the plaintiff would be wholly liable.

In *Loh Saik Pew* v *Tan Huat Chan*,[3] there was a collision between a motorcycle ridden by the plaintiff and a motor van driven by the defendant at the junction of Geylang Road, Aljunied Road and Lorong 22. The motorcycle entered the junction after the traffic light had turned green and in crossing the intersection, he was knocked down by the motor van from the right. The Court of Appeal held that though the motorcycle was entitled to enter and cross the junction, he should have kept a lookout, which he did not, for the motor van from the right which had properly entered the junction, and if he had kept a lookout he would have seen the motor van and would have been able to take effective steps to avoid the accident, and accordingly held that the motorcyclist was partly to blame for the accident. Chua J, delivering the judgment of the court, said at p 2:

> We are of the view that although the respondent was entitled to proceed and enter the junction immediately the lights turned green in his favour, he should in his own interest have kept a lookout for vehicles coming from the direction of Aljunied Road in case some vehicle which had properly entered the crossroads might still be passing across. If he had looked to his right when moving off from the stop line, he would have seen the appellant's motor van coming and would have been able to take effective steps to avoid a collision. We hold that, in all the circumstances prevailing, the respondent had contributed to this accident.

Clearly, in the circumstances of this case, the claim of the plaintiff against the first defendant must succeed, and I accordingly reversed the order made below.

Order accordingly.

Solicitors: *CP Lee & Co*; *Wu & Wong*.

Reported by *Ng Sheau Jiuan*

Swee Leong Cheng v Project Aqua Culture & Trading Co Pte Ltd

HIGH COURT (SINGAPORE) – ORIGINATING PETITION NO 71 OF 1986
CHAN SEK KEONG JC
27 MAY 1988

Companies and Corporations – Failure of company to lodge with Registrar of Companies such prescribed forms to effect resignation of directors – Failure of company to enter transfer of shares in the share register – Default of company to hold annual general meeting and to file its annual return – Criminal offence – Petitioner sole remaining director of defunct company – Liability of petitioner – Companies Act (Cap 50, 1985 Ed), ss 143, 175, 197, 391 & 408(3)

The petitioner is a director of the respondent company which was incorporated on 7 September 1981 as a private exempt company. The petitioner, who was a regular military officer and had no knowledge or experience of business practices, became the sole remaining director as well as the managing director after other directors ('the retired directors') retired and sold their shares to him. The petitioner failed to make the requisite entries in the statutory books of the company to reflect these changes. As a result, on 8 January 1988, summonses were issued under ss 175 and 197(4) of the Companies Act ('the Act') against each of the retired directors (and also the petitioner) for being a party to the default of the company in failing to hold its 1983 and 1984 annual general meetings and also in failing to lodge the annual returns for the same years. This led to the proceedings in originating summons no 87 of 1986 in which the retired directors obtained, inter alia, an order of court dated 25 July 1986 ('the said order') declaring that they had ceased to be directors since October 1981.

In this petition, the petitioner applied for the following reliefs under s 391 of the Companies Act (Cap 50, 1985 Ed):

(a) from any liability for fines and penalties which he may have incurred under s 143 of the Act or otherwise by reason of his negligence, default or breach of duty in having been a party to the default of the company in failing to hold its 1983 annual general meeting and, under prayer (c), its 1984 annual general meeting;

(b) from any liability for fines and penalties which he may have incurred under s 175 of the Act or otherwise by reason of his negligence, default or breach of duty in having been a party to the default of the company in failing to lodge the annual return for year 1983 with the Registrar of Companies within one month after the annual general meeting; and, under prayer (d), in failing to lodge the annual return for the year 1984 as aforesaid;

(c) from complying with the said order ordering the petitioner to lodge the relevant return giving effect to the resignations of the retired directors and to effect the necessary alterations in the statutory books of the company.

The petitioner's main ground was that he had sold all his shares in the company in February 1982 and had given all the books and materials relating to the company to the buyer.

Held, dismissing the petition: (1) The power to grant relief under s 391(1) of the Act may only be exercised by the court before which the proceedings are taken. On this ground alone, and without going into its merits, prayers (a), (b), (c) and (d) of the petition must be dismissed.

(2) By reason of s 408(3), a director is only liable under ss 175 and 197 if he 'knowingly and wilfully ... authorizes or permits the commission of the offence'. The present petition was presented on the basis that the petitioner, as a director, was in default, ie he knowingly and wilfully authorized or permitted the company to commit the said offences. If such be the case, it could not be established to the satisfaction of the court that the petitioner had acted reasonably and honestly and ought to be relieved from liability. In other words, if the petitioner had a good defence to the offences for which he is being charged, then he does not require any relief from this court.

(3) Where an officer has a defence to a criminal charge, the High Court ought not to arrogate to itself a jurisdiction which properly belongs to the magistrates' court.

(4) The court has no power under s 391 to relieve any person who is in default in complying with a court order from having to comply with it. It is tantamount to asking a court to abrogate or reverse its own order without an appeal and in the absence of the successful party. Therefore prayer (e) of the petition is entirely misconceived.

Cases referred to

1 *Re Gilt Edge Safety Glass Ltd* [1940] Ch 495 (folld)
2 *Customs and Excise Commissioners* v *Hedon Alpha Ltd* [1981] 2 All ER 697 (refd)
3 *Manning* v *Cory* [1974] ACLC 28015 (WA) (refd)
4 *Re Barry and Staines Linoleum Ltd* [1934] 1 Ch 227 (refd)
5 *Lawson* v *Mitchell* [1979] VR 529 (refd)

Legislation referred to

Companies Act (Cap 50, 1985 Ed) ss 143, 165, 175, 197(4), 391, 408(3)

Anna Oei (Miss) for the petitioner.

Cur Adv Vult

Chan Sek Keong JC: This is a petition by a director of the respondent company ('the company') for the following reliefs under s 391 of the Companies Act (Cap 50, 1985 Ed) ('the Act'):

(a) from any liability for fines and penalties which he may have incurred under s 143 of the Act or otherwise by reason of his negligence, default or breach of duty in having been a party to the default of the company in failing to hold its 1983 annual general meeting;

(b) from any liability for fines and penalties which he may have incurred under s 175 of the Act or otherwise by reason of his negligence, default or breach of duty in having been a party to the default of the company in failing to lodge the annual return for the year 1983 with the Registrar of Companies within one month after the annual general meeting;

(c) from any liability for fines and penalties which he may have incurred under s 143 of the Act or otherwise by reason of his negligence, default or breach of duty in having been a party to the default of the company in failing to hold its 1984 annual general meeting;

(d) from any liability for fines and penalties which he may have incurred under s 175 of the Act or otherwise by reason of his negligence, default or breach of duty in having been a party to the default of the company in failing to lodge the annual return for the year 1984 with the Registrar of Companies within one month after the annual general meeting;

(e) from complying with the order of court dated 25 July 1986 in originating summons no 87 of 1987 obtained by Ang Siak Kee, Chow Wai Hoong and Lau Kwok Wah (hereinafter called 'the retired directors') ordering the petitioner to:

(i) lodge with or send to the Registrar of Companies the return in Form 49 and such other prescribed form that will give full effect to the resignations of the retired directors;

(ii) effect the necessary alterations to the register of directors, managers and secretaries of the company by striking therefrom the names of the retired directors;

(iii) effect the necessary alterations to the share register of the company by striking out therefrom the names of the retired directors as shareholders.

In originating summons no 87 of 1986, the retired directors of the company were the plaintiffs and the company and the petitioner herein were the defendants. Both the defendants did not appear at the hearing of this summons, when, after reading the affidavits of the retired directors and hearing counsel, I made the following declaratory orders:

(1) the plaintiffs have ceased to be directors of Project Aqua Culture & Trading Co (Pte) Ltd with effect from 31 December 1981;

(2) that the first and second defendants within fourteen (14) days from the date of this order make good the default in failing to lodge with or send to the Registrar of Companies the return in Form 49 and such other prescribed form that will give full effect to the plaintiffs' resignation as directors of Project Aqua Culture & Trading Co (Pte) Ltd;

(3) that the register of directors, managers and secretaries of Project Aqua Culture & Trading Co (Pte) Ltd be rectified by striking out the plaintiffs' name therefrom as directors of the same and that the first and second defendants do effect the necessary alterations to the said register;

(4) that the plaintiffs have ceased to be beneficial owners of shares of Project Aqua Culture & Trading Co (Pte) Ltd with effect from 31 December 1981;

(5) that the first and second defendants within fourteen (14) days from the date of this order make good the

default in failing to enter such transfer of shares in the share register of Project Aqua Culture & Trading Co (Pte) Ltd from the plaintiffs to the second defendant;

(6) that the share register of Project Aqua Culture & Trading Co (Pte) Ltd be rectified by striking out the plaintiffs' name therefrom as shareholders of the same and that the first and second defendants do effect the necessary alterations to the said register.

The material facts giving rise to this petition are as follows. The company was incorporated on 7 September 1981 as a private exempt company with an authorized capital of $100,000 divided into 100,000 shares of $1 each. The petitioner, who was responsible for initiating the venture, and the three retired directors (ie Ang Siak Kee, Chow Wai Hoong and Lau Kwok Wah) were subscribers for one share each in the memorandum and articles of association of the company. They were also named as the first directors in the articles of association. The petitioner was a regular officer in the Singapore Armed Forces prior to the incorporation of the company and so had no knowledge or experience of business practices. Even before the company had been in business for more than a month, trouble began to brew. As at 11 April 1986 (according to a search made in the Registry of Companies by the solicitors for the retired directors) there was no change in the company's paid-up capital or the number and identities of the shareholders and the directors.

On 2 October 1981, Lau Kwok Wah resigned as a director and sold his share to the petitioner. Chow Wai Hoong and Ang Siak Kee also resigned as directors on 24 October 1981 and sold their shares to the petitioner. The petitioner, who was the sole remaining director as well as the managing director, failed to make the requisite entries in the statutory books of the company to reflect these changes in the shareholders as well as the directorship. As a result, on 8 January 1985, summonses were issued under ss 175 and 197(4) of the Companies Act against each of the retired directors (and also the petitioner) for being a party to the default of the company in failing to hold its 1983 and 1984 annual general meetings and also in failing to lodge the annual returns for the same year. This led to the proceedings in originating summons no 87 of 1986 in which the retired directors obtained, inter alia, an order of court declaring that they had ceased to be directors since October 1981.

In this petition, the main ground on which the petitioner has relied upon for relief was that his failure to comply with ss 143 and 165 of the Act for the years 1983, 1984 and all subsequent years was due to the fact that he had sold all his shares in the company to a company called Bumper Harvest Pte Ltd ('BHP') on or about 10 February 1982 and had given all the books and materials relating to the company to BHP. As evidence of this sale, he has produced a document (signed only by him but which, he alleged, was prepared by BHP) in which he acknowledged that he had sold his shares in the company to BHP. He also claimed that after the sale, he approached one of the directors of the purchaser viz Chow Yew Kee 'to request that all steps be taken to formalize my relinquishment of all connections with the company' and was 'assured that all steps necessary would be taken'.

After the petitioner was served with the two summonses for failing to hold the said annual general meeting and to file the said annual returns, he instructed his solicitors and they on 21 May 1986 wrote to BHP requesting it to remove the petitioner's name as director and shareholder of the company. On 27 May 1986, BHP replied that it did not buy any shares in the company but only its farm. Although subsequent correspondence between the petitioner's solicitors and BHP did not resolve the problem, the petitioner took no steps whatever either to sue BHP or to retrieve from BHP all the company's papers and documents which were allegedly in the possession of BHP. As matters stood at the date of the petition, the petitioner was the sole remaining director of the company which has been defunct since 1982. There is no evidence that any creditor has been prejudiced by the petitioner's default in complying with the requirements of the Act.

Counsel for the petitioner contended that the above facts showed that the petitioner had acted reasonably and honestly and that in all the circumstances of the case he ought to be relieved from liability in terms of paras (a) to (e) of his petition under s 391 of the Companies Act.

This petition raises a number of legal points which have not been appreciated by counsel. The first relates to the ambit of the statutory provision which reads as follows:

> (1) If in any proceeding for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the *court* (my emphasis) before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.
>
> (2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust he may apply to the Court for relief, and the Court shall have the same power to relieve him as under this section it would have had if it had been a court

before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought.

(3) The persons to whom this section applies are –

(a) officers of a corporation;

(b) persons employed by a corporation as auditors, whether they are or are not officers of the corporation;

(c) experts within the meaning of this Act; and

(d) persons who are receivers, receivers and managers or liquidators appointed or directed by the Court to carry out any duty under this Act in relation to a corporation and all other persons so appointed or so directed.

It can be seen at once that the power to grant relief under s 391(1) may only be exercised by the court before which the proceedings are taken. Although the Companies Act defines 'Court' to mean the High Court or a judge thereof, the word defined has a capital 'C' whereas the word 'court' used in this subsection has a small 'c' as distinguished from the use of the same word with a capital 'C' in sub-s (2). Assuming that the expression 'proceedings' include criminal proceedings, the criminal proceedings in respect of which reliefs have been prayed for in the petition are before the magistrates' courts. On this ground alone, and without going into its merits, prayers (a), (b), (c) and (d) of the petition must be dismissed: see *Re Gilt Edge Safety Glass Ltd.*[1]

The second point that counsel has not appreciated is that the court may only grant relief under s 391(1), and again assuming that it has the power to do so in respect of defaults which are in the nature of criminal offences, where the default is that of the person claiming relief. In *Customs and Excise Commissioners* v *Hedon Alpha Ltd,*[2] the Court of Appeal dismissed an application by a director for relief under s 448(1) of the Companies Act 1948 (which is in pari materia with s 391(1)) on the ground, inter alia, that the company alone was in default and not the director himself. In that case, the company was under a statutory obligation to pay betting duty under the Betting and Gaming Duties Act 1972, in default of which s 2(2) provided that the commissioner was entitled to recover from any director of that company. In other words, the director was statutorily liable even though he was not in default.

In the present case, the offences for which the petitioner has been charged were in respect of ss 175 and 197 of the Companies Act. They read as follows:

175(1) A general meeting of every company to be called the 'annual general meeting' shall in addition to any other meeting be held once in every calendar year and not more than 15 months after the holding of the last preceding annual general meeting, but so long as a company holds its first annual general meeting within 18 months of its incorporation, it need not hold it in the year of its incorporation or in the following year.

...

(4) If default is made in holding an annual general meeting –

(a) the company and every officer of the company who is in default shall be guilty of an offence; and

(b) the court may on the application of any member order a general meeting to be called.

197(1) Every company having a share capital shall make a return containing the particulars referred to in Part I of the Eight Schedule and accompanied by such copies of documents as are required to be included in the return in accordance with Part II of that Schedule and such of the certificates and other particulars prescribed in that Part as are applicable to the company.

...

(7) If a company fails to comply with this section, the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $2,000 and also to a default penalty.

Under ss 175 and 197, a director is only liable if he is in default. This does not mean that because a company is in default in complying with s 175 or s 197, a director is automatically an officer who is in default. The reason is that s 408(3) of the Companies Act provides as follows:

For the purposes of any provision of this Act which provides that an officer of a company or corporation who is in default is guilty of an offence under this Act or is liable to a penalty or punishment, the phrase 'officer who is in default' or any like phrase means any officer of the company or corporation who knowingly and wilfully –

(a) is guilty of the offence; or

(b) authorizes or permits the commission of the offence.

By reason of s 408(3), a director is only liable under s 175 (for the company's failure to hold an annual general meeting) and s 197 (for the company's failure to file its annual return) if he 'knowingly and wilfully ... authorizes or permits the commission of the offence'. In *Manning* v *Cory*[3] Burt J said with reference to the words 'knowingly and wilfully':

I recognize the difficulty in applying the words 'knowingly and wilfully ... authorizes or permits an offence' to a case in which the offence is one of omission – a failure to do something which the law requires to be done. I would have thought however that these words require that the prosecution to establish a case to answer must lead evidence upon which, if accepted, it could be held that the accused knew the thing not done was not done and in the free exercise of his will authorized or permitted the non-doing of it but I cannot accept the view that in addition the prosecution must call evidence upon which it could be found that the accused knew there was a law in force which made the failure to do the act unlawful. See generally *Iannella* v *French* (1967) 119 CLR at p 84.

The present petition was presented to this court on the basis that the petitioner, as a director, was in default, ie he knowingly and wilfully authorized or permitted the company to commit offences under ss 175 and 197 of the Companies Act for the years 1983 and 1984. If such be the case, how could it be established to the satisfaction of this court that the petitioner had acted reasonably and honestly and that in all the circumstances of the case he ought to be relieved from liability. If it could be estab-

lished that the petitioner had so acted in relation to the said defaults, then he should be able to establish that he did not knowingly or wilfully authorize or permit the company to commit the said offences. In other words, if the petitioner had a good defence to the offences for which he is being charged, then he does not require any relief from this court. It seems to me that in a case where an officer has a defence to a criminal charge, this court ought not to arrogate to itself a jurisdiction which properly belongs to the magistrates' courts.

This leads me to the fundamental point as to whether s 391 was ever intended to apply to criminal offences. The use of the expression 'claim' in s 391(2) would suggest that relief is granted only for civil breaches of duty or defaults. It is true that in England, the courts have applied the equivalent provisions in the English Companies Act to grant relief against criminal sanctions: see *Re Barry and Staines Linoleum Ltd.*[4] However, in *Lawson* v *Mitchell,*[5] the Full Court of the Supreme Court of Victoria, after an exhaustive discussion of the history, the English provision and the English authorities, viz *Re Barry and Staines Linoleum Ltd*[4] and *Re Gilt Edge Safety Glass Ltd,*[1] came to the conclusion that the equivalent provision in the Victoria Companies Act 1961 did not apply to proceedings for an offence under the said Act. Counsel has not addressed me on this point. In view of my other findings, I will leave this point open for decision in some other application at some other time.

Counsel for the petitioner has also failed to appreciate that s 391 does not give to the court a special power of dispensation with regard to its orders or judgments. The court has no power under s 391 to relieve any person who is in default in complying with a court order from having to comply with it. It is tantamount to asking a court to abrogate or reverse its own order without an appeal and in the absence of the successful party. The petitioner should have appeared and defended the plaintiffs' claims in originating summons no 87/86 on the ground that he was under no liability or that if he were, he was entitled to relief. It is too late for him to attempt to do it in these proceedings. Paragraph (e) of the petition is entirely misconceived.

For the above reasons, the petition is dismissed.

Order accordingly.

Solicitors: *Hee Theng Fong & Co.*

Reported by *Wong Kim Fatt*

Tai Muk Kwai & Ors v Luen Hup Medical Company

HIGH COURT (SINGAPORE) – SUIT NO 1156/81
CHAN SEK KEONG JC
13 MAY 1988

Trademarks – Copyright – Rival claim of ownership of trademarks – Goods manufactured by plaintiffs and exclusively sold and distributed by defendant as sole importer – Whether assignment of trademarks confers ownership thereof – Passing off – Defence of bona fide purchaser for value without notice

This is a claim by three non-resident plaintiffs against the defendants, a Singapore firm, for (a) a declaration that they or one or more of them are the beneficial proprietors of two trademarks nos 56886 and 58670 registered in the name of the defendants in respect of medicinal products; (b) an order directing the defendants to cause the trademarks to be vested in the plaintiffs; (c) damages for passing off; (d) damages for infringement of copyright; (e) an injunction to restrain the defendants from applying a false description to the pills as being manufactured by the first plaintiff; and (f) various other ancillary reliefs.

The first plaintiff (a firm) has been manufacturing Chinese medicinal products in Taiwan, including certain rheumatism pills sold in Taiwan and Hong Kong and known as 'Nan Lien Chuifong Toukuwan' ('the Chuifong pills'). In 1972, the first plaintiff set up a factory in Hong Kong to manufacture, inter alia, the Chuifong pills. The first plaintiff has been selling its products through Shey Fon Trading ('Shey Fon') in Hong Kong, which was described as a subsidiary of the first plaintiff. In 1975, the business of Shey Fon was taken over by the second plaintiff. The third plaintiff (a firm) was also a manufacturer and dealer of pharmaceutical products. Its proprietor is Shu Jann Yuen (PW1), the brother of Shu Jann Chang (PW2) who was the proprietor of Shey Fon, and, at the date of hearing, the director of the second plaintiff and also the manager of the first plaintiff. The third plaintiff, based in Taiwan, also supplied the Chuifong pills to Shey Fon in Hong Kong. All the plaintiffs, since 1972, have had a common interest in the Chuifong pills and their brand name.

In 1972, one Ong Kim Cheng ('Ong'), a Singapore resident, approached the third plaintiff for the rights to export the Chuifong pills to Singapore and Malaysia. At that time, the Chuifong pills were already known as Nan Lien Chuifong Toukuwan in Taiwan and Hong Kong. Ong, through his company ('Ultra'), was allowed initially to sell the pills in Singapore and Malaysia.

On 21 November 1972, Ultra informed Shey Fon that it had expanded the market for Chuifong Toukuwan through the distribution network of the defendants. Subsequently, Ultra obtained registration of two trademarks relating to the products in question with the consent or acquiescence of one or more of the plaintiffs although none of them required Ultra to register the trademarks in their names. An agency agreement dated 12 April 1973 was subsequently entered into between Shey Fon and Ultra with the third plaintiff's signature appended. Ultra was appointed the sole agent for Singapore, Malaysia and Indonesia for three years.

Eventually, in 1974, Ultra gave up its agency rights to the defendants who then became the sole agents/distributors for the region. On 4 November 1974, Ultra and the defendants signed an agreement whereby Ultra assigned its pending five